

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No.85/2016**

% **25th July, 2017**

ICICI BANK LIMITED Appellant

Through: None.

versus

MOHD ZAHEEN Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. In this Regular Second Appeal notice was issued to the respondent in terms of the order of a learned Single Judge of this Court dated 22.3.2016. The courts below have dismissed the suit for recovery of Rs. 2,57,601.67/- filed by the appellant/plaintiff as barred by limitation.

2. By the order of a learned Single Judge of this Court dated 22.3.2016 notices were issued for 10.8.2016 and for which date the report was that the respondent was un-served as he was no longer residing at the given address and had shifted to Mumbai.

3. Vide the next order dated 10.8.2016 fresh notice was issued for 25.10.2016 at the old address or at the fresh address. No notice was however got issued and last opportunity was granted to the appellant vide order dated 25.10.2016 to comply with the order dated 10.8.2016. By this order dated 25.10.2016, it was ordered that in case process fee is not filed within four weeks thereafter the same will be taken on record subject to deposit of costs of Rs.5,000/-.

4. Once again for 12.1.2017 notices could not be issued for want of process fee. On the next date i.e. on 12.1.2017 it was stated that the appellant will take steps for substituted service of the respondent and thereafter when the matter was listed on 12.4.2017 application was not filed and even for today there is no application on record for effecting substituted service on the respondent/defendant. Of course, I doubt that substituted service can be ordered to be affected without making sufficient endeavors to serve the respondent/defendant in the ordinary method and which endeavors have not taken place.

5. A counsel had appeared on behalf of the appellant on the first call, but on the second call no one appears for the appellant as on

the first call it was stated that the main counsel Mr. Punit K. Bhalla, Advocate will be called, but no counsel is present on the second call.

6. I have, therefore, examined the issue as to whether at all notices should be issued in this Regular Second Appeal or not.

7. The facts of the case are that the appellant/plaintiff filed the subject suit for recovery of Rs.2,57,601.67/- against the respondent/defendant on account of the respondent/defendant having availed the overdraft facility in the current account maintained by the respondent/defendant with the appellant/plaintiff/bank. Admittedly, the last entry in the overdraft account whereby overdraft facility was availed was on 22.2.2011. Suit was filed on 29.8.2014 and hence the suit was held to be time barred having been filed three years after 22.2.2011.

8. The issue argued on behalf of the appellant before this Court, and as reflected from the order dated 22.3.2016 passed by the learned Single Judge of this Court while issuing notice in this RSA was that Article 1 of the Limitation Act, 1963 applies and limitation will be counted from the close of the year in which the last item of transaction is admitted or proved. It was accordingly argued that the

courts below have wrongly dismissed the suit as time barred by applying Articles 19 and 21 of the Schedule of the Limitation Act.

9. In my opinion to a simple overdraft account Article 1 of the Limitation Act does not apply because in an overdraft account there is no mutuality of transactions i.e there are transactions which only create obligations on one side with the other entries being only towards complete or partial discharge of such obligations. For Article 1 of the Limitation Act to apply there has to be mutuality of obligations and not one sided obligations. This has been held by the Supreme Court in the judgment in the case of ***Hindustan Forest Company Vs. Lal Chand & Others, AIR 1959 SC 1349***, and relevant paras 7 to 10 of which judgment read as under:-

“7. The question what is a mutual account, has been considered by the courts frequently and the test to determine it is well settled. The case of the *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah*, may be referred to. There a company had been advancing monies by way of loans to the proprietor of a tea estate and the proprietor had been sending tea to the company for sale and realisation of the price. In a suit brought by the company against the proprietor of the tea estate for recovery of the balance of the advances made after giving credit for the price realised from the sale of tea, the question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by art. 85 of the Indian Limitation Act. Rankin, C.J., laid down at p. 668 the test to be applied for deciding the question in these words:

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Halloway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create

obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

8. The observation of Rankin, C.J., has never been dissented from in our courts and we think it lays down the law correctly. The learned Judges of the appellate bench of the High Court also appear to have applied the same test as that laid down by Rankin, C.J. They however came to the conclusion that the account between the parties was mutual for the following reasons:

"The point then reduces itself to the fact that the defendant company had advanced a certain amounts of money to the plaintiffs for the supply of grains. This excludes the question of monthly payments being made to the plaintiffs. The plaintiffs having received a certain amount of money, they became debtors to the defendant company to this extent, and when the supplies exceeded Rs. 13,000 the defendant company became debtors to the plaintiff and later on when again the plaintiff's supplies exceeded the amount paid to them, the defendants again became the debtors. This would show that there were reciprocity of dealings and transactions on each side creating independent obligations on the other."

9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the sellers had undertaken to make delivery of goods and the buyer had agreed to pay for them and had in part made the payment in advance. There can be no question that in so far as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer. The learned Judges do not appear to have taken a contrary view of the result of these payments.

10. The learned Judges however held that the payment of Rs. 13,000 by the buyer in advance before delivery had started, made the sellers the debtor of the buyer and had created an obligation on the sellers in favour of the buyer. This apparently was the reason which led them to the view that there were reciprocal demands and that the transactions had created independent obligations on each of the parties. This view is unfounded. The sum of Rs. 13,000 had been paid as and by way of advance payment of price of goods to be delivered. **It was paid in discharge of obligations to arise under the contract. It was paid under the terms of the contract which**

was to buy goods and pay for them. It did not itself create any obligation on the sellers in favour of the buyer; it was not intended to be and did not amount to an independent transaction detached from the rest of the contract. The sellers were under an obligation to deliver the goods but that obligation arose from the contract and not from the payment of the advance alone. If the sellers had failed to deliver goods, they would have been liable to refund the monies advanced on account of the price and might also have been liable in damages but such liability would then have arisen from the contract and not from the fact of the advances having been made. Apart from such failure, the buyer could not recover the monies paid in advance. No question has, however been raised as to any default on the part of the sellers to deliver goods. This case therefore involved no reciprocity of demands. Article 115 of the Jammu and Kashmir Limitation Act cannot be applied to the suit.” (emphasis added)

10. Similar was the view of the Supreme Court in the case of ***Kesharichand Jaisukhal Vs. Shillong Banking Corporation AIR 1965 SC 1711***, where however in the facts of the case Article 1 of the Limitation Act was held to apply on account of reciprocal obligations existing because in the overdraft account there were also deposits which were made by the customer and which thus created independent obligations to repay the amount of cash deposits and also on account of the cheques, hundis and drafts deposited for collection. The ratio in the case of ***Hindustan Forest Company (supra)*** was however reiterated in ***Shillong Banking Corporation's*** case (*supra*) that there is required existence of mutual dealings between the parties. The relevant paras of the judgment in the case of ***Shillong Banking***

Corporation (supra) are paras 10 to 12, and these paras read as under:-

“10. The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is barred by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.

11. Now in the leading case of *Hirada Basappa v. Gadigi Muddappa*, Holloway, Acting C.J. observed:

"To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

These observations were followed and applied in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* and *Monotosh K. Chatterjee v. Central Calcutta Bank Ltd.*, and the first mentioned Calcutta case was approved by this Court in *Hindustan Forest Company v. Lal Chand*, Holloway, Acting C.J. laid down the test of mutuality on a construction of s. 8 of Act XIV of 1859, though that section did not contain the words "where there have been reciprocal demands, between the parties". The addition of those words in the corresponding Art. 87 of Act IX of 1871, Art. 85 of Act XV of 1877 and Art. 85 of the Act of 1908 adopts and emphasizes the test of mutuality laid down in the Madras case.

12. In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance

was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 29, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to s. 45(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative.”
(underlining added)

11. In the present case, it is seen that there is no mutuality of obligations and transactions are one sided only being in the nature of grant of overdraft by the appellant/plaintiff/bank to the respondent/defendant and therefore any payment by the respondent/defendant is only towards discharge of the obligation created in favour of the appellant/plaintiff/bank. There are no transactions on each side creating independent obligations because there is no obligation of the appellant/bank towards the respondent/defendant. Therefore, Article 1 of the Limitation Act cannot come to aid of the appellant/bank. Suit, therefore, filed on 29.8.2014 was barred by limitation on account of the last overdraft facility being availed on 22.2.2011 and on which date will arise the balance due in the overdraft account in favour of the appellant/bank and against the respondent/defendant.

12. I may also note that even for the sake of arguments if Article 1 of the Limitation Act applies, even then since the last entry of overdraft availed in the account by the respondent/defendant was on 22.2.2011, the year ending would be 31.3.2011. The suit, therefore, could have been filed by the appellant/plaintiff/bank only latest by 31.3.2014. The suit was however filed on 29.8.2014 and consequently even for the sake of arguments if Article 1 of the Limitation Act is to apply, the suit filed in the present case on 29.8.2014 i.e after 1.4.2014 was hence barred by limitation.

13. No substantial question of law arises. Dismissed.

JULY 25, 2017

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VALMIKI J. MEHTA, J